the appellant's claim by the authorities referred to above, first in *Charlesworth* v. *Holt* ninety years ago. Although some doubts were expressed in *Hyman* v. *Hyman* [9] concerning the earlier decision, it was expressly affirmed in *May* v. *May*. In both *Charlesworth's* case and in *May's* case, an absolute promise to pay maintenance was held to continue after dissolution of the marriage and in *Adams* v. *Adams* even after a decree of nullity. As counsel for respondent submitted, still less can there be any basis for the application of the doctrine of frustration when all that has happened is that the husband requested the wife "to take up residence with him" and that "one or more of the children are now gainfully employed and are no longer in need of maintenance" from the husband.

It appeared to be common ground between counsel during the hearing of the appeal that the principles of English law of contract would apply to this contract, which counsel stated was made in Singapore. I can see no reason why the principle applied in the English authorities should not apply to the circumstances disclosed in this appeal. Counsel for appellant conceded that, if this principle does apply, he cannot support this appeal. I agree and would therefore dismiss this appeal with costs to the respondent.

Barakbah C.J. (Malaya) concurred.

Appeal dismissed.

Solicitors: *Skrine & Co.*; *Donaldson & Burkinshaw.*

PASUMA PHARMACAL CORPN. v. McALISTER & CO. LTD.

[O.C.J. (Ambrose J.) January 11, 1964]

[Singapore — Suit No. 1353 of 1960]

Contract — Manufacturers and importers — Distribution of chicken essence — Manufacturers giving exclusive right to importers — Whether relationship created is that of principal and agent or vendor and purchaser.

Contract — Vendor and purchaser agreement in respect of chicken essence — Agreement for 5 years — Termination by vendor without provision for termination — Fraud of servant of purchaser — Whether termination lawful before the expiration of the contract.

Damages — Breach of agreement by one party — Duty upon other party to take all reasonable steps to mitigate loss occasioned by the breach.

Agency — Exclusive right to distribute not agency contract.

Detinue — Not maintainable where there is no prior demand for return.

Conversion — Not maintainable unless plaintiff had the right of possession and a right of property in the goods at the time of the alleged conversion.

Under an agreement dated November 12 and 19, 1957 the defendants became exclusive distributors for a period of 5 years of the plaintiffs' chicken essence manufactured in New York. The chicken essence was sold in Singapore and Malaya under the "Apollo" trade mark of which the defendants were registered proprietors.

In May 1958 the defendants discovered that certain stocks of the chicken essence which they had received from the plaintiffs were cloudy and contained sediment. Following correspondence between the parties regarding this cloudiness and sediment, it was agreed by them in a cable sent by the defendants on January 5, 1959 and accepted by the plaintiffs on January 7, 1959 that the plaintiffs would replace the cloudy jars without cost to the defendants. The replacement was, however, to be carried out gradually over a period of time and this gradual extinguishment of the liability to replace substandard chicken essence was described by the parties as "amortization".

Under this amortization scheme the plaintiffs replaced a total of 1935 cartons of 3½ oz. jars and the defendants returned to the plaintiffs only 1288 57/72 cartons of the old stock which became the property of the plaintiffs under the scheme. The plaintiffs brought this action claiming:—

(1) damages for conversion of 646 15/72 cartons or their market value, alternatively,

a claim in detinue for 646 15/72 cartons of fresh chicken essence stock supplied in place of the quantity not returned by the defendants;

(2) damages for breach of the amortization agreement.

The defendants counterclaimed:—

(1) the full value of 634 127/144 cartons of 1¾ oz. jars containing sub-standard chicken essence which would have been amortized if the plaintiffs had not, by a letter dated June 3, 1960, repudiated the amortization;

(2) the sum of $44,495.55 due on a guarantee by the plaintiffs of the account of Chang Hway Trading Co. Ltd.;

(3) damages for termination of the contract of November 19, 1957 in breach of clause 8 of the contract which stated that the contract would continue for 5 years.

Held: (1) the plaintiffs' alternative claim in detinue was untenable because the prerequisite of a claim in detinue is a demand for return and no such demand was made; *Clayton* v. *Le Roy* [1] followed;

(2) of the 646 15/72 cartons claimed by the plaintiffs in conversion, 500 cartons had never really existed; the figure had been fraudulently added by a servant of the defendants to inflate the quantity to be amortized and therefore the 500 cartons received by the defendants as replacement were obtained by fraud; the defendants were liable for the fraud of their servant and must therefore pay to the plaintiffs the full price of these 500 cartons;

(3) as to the balance of 146 15/72 cartons there was evidence that 17 40/72 cartons were destroyed by the defendants at Kuala Lumpur; in respect of the remaining 128 47/72 cartons the court could not find conversion as there was no evidence that they had become the property of the plaintiffs before they were disposed of; in order to maintain an action of trover a person must have the right of possession and a right of property in the goods at the time of the alleged conversion; *Jarvis* v. *Williams* [2] followed;

(4) although the plaintiffs had failed to prove conversion in respect of the 128 47/72 cartons, the defendants were liable to account for them; their value would be the price which the plaintiffs could have reasonably expected to obtain from an importer willing to purchase them on the date on which the plaintiffs demanded their return;

(5) the plaintiffs' claim for damages for breach of the amortization agreement was founded on their plea that the defendants had agreed with them not to put on the open market for sale further stock of 3½ oz. bottles after March 31, 1959. The court could find no express written or oral term to this effect; further, there was no suggestion in the correspondence that there was an implied term to this effect in January 1959; such a term could only be implied if it was clear that both parties intended such a term to operate although they did not express it; the correspondence did not show that both parties on January 7, 1959 intended such a term to operate; plaintiffs' claim for damages for breach of the amortization agreement must therefore be dismissed;

(6) the defendants' first counterclaim must be dismissed as there was a duty upon the defendants to take all reasonable steps to mitigate the loss caused by the plaintiffs' breach of the amortization agreement and the defendants were debarred from claiming compensation for any part of the damage which was due to the defendants' neglect to do so; an opportunity to mitigate the defendants' loss arose through the offer made by the plaintiffs to buy back the sub-standard stock of 1¾ oz. jars; the offer was reasonable and the defendants should have mitigated their loss by accepting it; *British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Railway Co. of London* (3) and *Payzu* v. *Saunders* (4) followed;

(7) the second counterclaim succeeded; a surety is discharged in consequence of an agreement giving time between the creditor and the principal debtor only if it is really binding and capable of enforcement; there was no binding agreement between the defendants and Chang Hway Trading Co. to give time and the plaintiffs were not therefore discharged;

(8) the third counterclaim succeeded; the terms of the contract of November 19, 1957 did not empower either party to terminate the contract before the expiration of five years as from May 1, 1957 and the parties had not agreed to rescind the contract; the defendants were appointed exclusive distributors with a monopoly in the sale of the plaintiffs' product; the relationship between the parties was that of vendor and purchaser and not that of principal and agent; the contract could not be terminated, therefore, before the expiration of five years;

(9) the unlawful termination of the contract deprived the defendants of the profits they would have made if the contractual relationship had subsisted for five years; the damages to which they were, therefore, entitled were the estimated profits they could have made from the date of termination of the contract to the expiration of the five years.

Cases referred to:

(1) *Clayton* v. *Le Roy*, [1911] 2 K.B. 1031.

(2) *Jarvis* v. *Williams*, [1955] 1 All E.R. 108.

(3) *British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Railways Co. of London*, [1912] A.C. 673, 689.

(4) *Payzu* v. *Saunders*, [1919] 2 K.B. 581.

CIVIL SUIT.

M. B. Brash for the plaintiffs.

J. E. Lloyd for the defendants.

Cur. Adv. Vult.

Ambrose J.: The plaintiffs are manufacturers of chicken essence in the State of New York, and the defendants are importers in Singapore. From 1956 both parties worked together to capture the market for chicken essence in Singapore and Malaya from the manufacturers of "Brand's" chicken essence. Towards the end of 1956, the plaintiffs succeeded in producing a chicken essence which, in the opinion of the defendants, was identical with "Brand's" chicken essence. As from the 1st May, 1957, the defendants became exclusive distributors for a period of 5 years in Singapore, Malaya, Sarawak, North Borneo, Brunei, Thailand and Hongkong, of chicken essence manufactured by the plaintiffs and sold under the "Apollo" trade mark, of which the defendants were the registered proprietors. An agreement to this effect, Ex. A. B. 1 and 2, was signed by both the plaintiffs and defendants on the 12th and 19th November, 1957, respectively. By a letter dated the 20th May, 1958, Ex. 2 A. B 10, the defendants complained to the plaintiffs about the cloudiness and sediment in the chicken essence supplied by the plaintiffs. The plaintiffs' reply dated the 28th May, 1958, Ex. 2 A. B. 14, stated that this was due to the natural high protein content. By a further letter dated the 2nd August, 1958, 2 A. B. 18, the defendants asked the plaintiffs to take back, recondition and return the chicken essence supplied to them. The plaintiffs' reply dated the 21st August, 1958, Ex. 2 A. B. 19, stated that one of the controls could have slipped during production to bring about the cloudy condition; and that the plaintiffs would stand behind their product and accept the cloudy jars for reconditioning. By a further letter dated the 24th November, 1958, Ex. A. B. 8, the defendants informed the plaintiffs that they were discouraged by the number of jars rejected owing to the cloudy appearance; and stated that they were jeopardizing the future of their agency by continuing with the sale of the cloudy stocks, which should be dumped in the sea or destroyed in the incinerator. On the 24th November, 1958, O'Keefe, a director of the plaintiff corporation, wrote a letter, Ex. A. B. 233 and 234, to Watt, the chairman of the defendants' board of directors, stating that the plaintiffs had succeeded in producing a chicken essence of outstanding quality and clearness and that they would like the defendants to place new orders, and suggesting that the defendants arrange with the plaintiffs for a replacement of their existing stocks amortized over a year and a half. Watt's reply to O'Keefe dated the 5th December, 1958, Ex. A. B. 235, stated that the latest samples of "Apollo" chicken essence looked very good, and that the defendants were prepared to consider the suggestion as to replacement of the existing stocks. On the 9th December, 1958, Vanelzas, the president of the plaintiff corporation, wrote a letter, Ex. A. B. 237, to Watt thanking him for his concurrence regarding an amicable arrangement as to amortizing the replacement of the

sub-standard stocks during a period of 12 to 18 months, and stating that Watt would receive all of the details regarding any arrangement from Moeloek. Moeloek was an Indonesian and a vice-president of the plaintiff corporation.

On the 4th January, 1959, Moeloek saw the defendants. And on the 5th January, 1959, Moeloek and the defendants sent off a cablegram to the plaintiffs as follows:

"REVISED STOCK AT 31/12 3783 AND 1170 EXPECTED SALES NEXT QUARTER 1500 LEAVING 3400 TO BE AMORTIZED MCALISTER'S COUNTER-PROPOSAL 50% AMORTIZATION OF FIRST ORDER 3000 CARTONS 3½ OZ. THEN AFTERWARDS 10% PROVIDED NO INCREASE PRICE UNTIL TOTALLY AMORTIZED STOP EXPECTED INDENTS 1959 12000 CARTONS PLEASE ADVICE."

The plaintiffs replied by cablegram on the 7th January, 1959, as follows:

"RE YOUR TEL 5TH COUNTER PROPOSAL ACCEPTED IN FULL."

The cablegrams were confirmed by the defendants' letter of the 8th January, 1959, Ex. A. B. 9, and the plaintiffs' letter of the same date, Ex. A. B. 10.

It seems to me clear from O'Keefe's letter of the 24th November, 1958, Ex. A.B. 233, Watt's reply of the 5th December, 1958, Ex. A. B. 235, and Vanelzas' letter of the 9th December, 1958, Ex. A. B. 237, that by the word "amortization" the parties meant extinguishment of a liability over a period of time, and that the liability which they agreed to amortize was the plaintiffs' liability to replace sub-standard chicken essence.

In the cable of the 5th January, 1959, the word "amortized" clearly means "replaced under the amortization scheme". What the defendants' cable meant was this. Their stock of cloudy or sub-standard "Apollo" chicken essence as at the 31st December, 1958, was 3783 cartons of 3½ oz. gold-lid bottles and 1170 cartons of 1¾ oz. red-lid bottles. During the first quarter of 1959 they expected to sell 1500 cartons of the former, leaving 2283 cartons of the former and 1170 cartons of the latter to be replaced by the plaintiffs. The total number of cartons to be replaced was thus 3453, or roughly 3400. The defendants' counter-proposal was that 50% of the first 3000 cartons of 3½ oz. red-lid bottles of the clear chicken essence to be ordered by the defendants should be used to replace 1500 cartons of 3½ oz. gold-lid bottles of the cloudy chicken essence; and that 10% of the cartons subsequently ordered should be used to replace a corresponding quantity of the remaining stocks of cloudy chicken essence. The defendants expected to place orders for a total of 12000 cartons in 1959, provided there was no increase in the price until replacement of the cloudy stocks had been completed. The plaintiffs accepted the counter-proposal in full. It was not disputed that the replacements were to be supplied free. It may be added here that each carton of 3½ oz. bottles contained 72 bottles; and that each carton of 1¾ oz. bottles contained 144 bottles.

In their amended statement of claim the plaintiffs claim:

(1) damages for the conversion of 646 15/72 cartons of 3½ oz. gold-lid bottles of "Apollo" chicken essence or the market value thereof;

and alternatively

the return of 646 15/72 cartons of 3½ oz. red-lid bottles of "Apollo" chicken essence wrongfully detained from the plaintiffs or their value and damages; and

(2) damages for breach of the agreement of the 7th January, 1959.

The claim for conversion is said to arise in this way. Pursuant to the agreement of the 7th January, 1959, the plaintiffs replaced 1923 36/72 cartons of 3½ oz. gold-lid bottles by other cartons by the 3rd June, 1960. It is not disputed that the defendants' servant, W. R. Dennis, inflated the amount of cartons to be replaced by 500 cartons. In the defendants' letter to the plaintiffs dated the 31st October, 1959, Ex. A. B. 41, Dennis falsely stated that the number of cartons of 3½ oz. gold-lid bottles returned by dealers in Singapore was 550 63/72, when in fact it was only 50 63/72. In the defendants' letter to the plaintiffs dated the 23rd November, 1959, Ex. A. B. 50, Dennis repeated this false statement and also falsely stated that the total amount of cartons to be replaced was 1949 1/72. On the 3rd June, 1960, the plaintiffs having become suspicious, wrote a letter to the defendants, Ex. A. B. 81, stating that they would not proceed further with the scheme of amortization; and that they had amortized to the extent of 1923 36/72 cartons. By their solicitor's letter dated the 16th August, 1960, Ex. A. B. 92, the plaintiffs demanded the return of 1923 cartons of 3½ oz. gold-lid bottles as the property of the plaintiffs which had been replaced by other cartons under an agreed amortization scheme. It is not disputed that the defendants returned to the plaintiffs' solicitor only 1288 57/72 cartons. It is not disputed that the total amount of cartons replaced by the plaintiffs was finally altogether 1935. The plaintiffs say that the defendants converted the 646 15/72 cartons of 3½ oz. gold-lid bottles which were not returned. Alternatively, the plaintiffs say that, if they cannot sue for conversion of the 646 15/72 cartons of 3½ oz. gold-lid bottles, they are entitled to sue in detinue for the 646 15/72 cartons of 3½ oz. red-lid bottles supplied in their place. The defendants submit that the pre-requisite of a claim in detinue is a demand for return, that no such demand was made, and that therefore the claim in detinue is untenable. I accept this submission, which is based on *Clayton* v. *Le Roy*,[1] and dismiss the claim in detinue.

I return now to the claim for conversion. The defendants submit that 500 cartons of 3½ oz. gold-lid bottles never existed and could not therefore have been converted. I accept this submission. The defendants, by their counsel, admitted during the trial that their servant, Dennis, was guilty of fraud in increasing by 500 cartons the amount of cartons of 3½ oz. gold-lid bottles to be replaced, and thereby obtaining 500 cartons of 3½ oz. red-lid bottles free; and also that they are liable for their servant's fraud. I accordingly hold that the defendants are liable on this ground to pay the plaintiffs the c.i.f. cost of 500 cartons of 3½ oz. red-lid bottles, which amounts to $39,000 at the rate of $78 per carton.

As regards the claim for conversion, the defendants further submit that the only cartons which could be said to have been converted were 160 40/72 cartons, which were destroyed by the defendants. I accept the defendants' evidence that 17 40/72 cartons were destroyed at Kuala Lumpur towards the end of February, 1960. The defendants' store-keeper, Ong Thiam Swee, testified that he carried out seven destruction orders signed by Dennis, Ex. D. 25, on the dates mentioned in the orders; and that altogether 143 cartons were destroyed in Ong's presence in Singapore by labourers, who opened every bottle and threw the contents down the drain. The defendants' amortization stock card, Ex. D. 18 (Ex. A. B. 96), contains 7 entries relating to destruction of 143 cartons as follows:

21.3.60	6
22.3.60	20
25.3.60	30
4.4.60	22
25.4.60	20
23.5.60	25
27.6.60	20

These dates correspond with the dates mentioned in the destruction orders.

It is necessary now to look into the correspondence between the parties to find out what arrangement was made as regards the mode of destruction. In Watt's letter of the 18th September, 1959, to Vanelzas, Ex. A. B. 35, he said:

"We have now collected all the old 3½ oz. gold-lid stocks from the branches, and would like to have a visit from Mr. Moeloek in the near future. We would like him to verify the quantity before having this lot sent to the incinerator, from whom in any case we would get an official receipt."

In his reply of the 9th October, 1959, Ex. A. B. 37, Vanelzas said:

"I appreciate your gesture of wanting Moeloek to verify the quantity before you send same to the incinerator . . . . . I suggest that your office mails to us a tally, stating how many cases came from each branch. It is not necessary to have Moeloek certify this tally, as our relationship, in my opinion, is one of complete trust and fairplay."

In their letter of the 9th October, 1959, Ex. A. B. 36, the plaintiffs said to the defendants:

"It was recommended by Mr. Watt to have our Mr. Moeloek visit you to verify the quantities of these stocks before disposal. We do not feel that this is quite necessary . . . . ., your total of the quantity to be disposed of will suffice for our records."

In his letter of the 16th October, 1959, Ex. A. B. 39, Watt said to Vanelzas:

"I note you will take our word for it in regard to the stocks being delivered to the incinerator."

In their letter of the 3rd June, 1960, Ex. A. B. 81, the plaintiffs wrote to the defendants as follows:

"We . . . . . have regretfully come to the conclusion that the amortization as proposed should now cease and cannot continue further.

. . . . . .

We also feel that we should act on the recommendation of Mr. Watt to have Mr. Moeloek verify the quantities of the stocks still undisposed of and we go into the quantities of the stocks already disposed of. We did mention in our letter dated October 9th, 1959, that we did not feel that this was quite necessary. But in view of the figures supplied by you and the financial loss which we may have to incur if we continue with the proposed scheme of amortization further verification and investigation in the matter should take place to assist us in arriving at a decision."

It is clear that the arrangement between the plaintiffs and the defendants was that any destruction of gold-lid stocks would be carried out in the government incinerator and that an official receipt for the stocks destroyed would be produced. It seems to me that I must reject the whole of the defendants' evidence as to the destruction of 143 cartons in Singapore for these reasons. No change in the arrangement for the destruction was made. If any change was desired by the defendants, the consent of the plaintiffs should have been obtained. No notice of any kind was given to the plaintiffs either before or after any of the seven alleged destructions. Lee Chin Seah, the clerk who made the entries in the defendants' amortization stock card, Ex. D. 18, said he did so on or after the 30th June, 1960, and not on the dates of the alleged destructions set out in Ex. D. 18. It seems to me from the plaintiffs' letter of the 3rd June, June, 1960, Ex. A. B. 81, and Dennis's letter of the 16th June, 1960, Ex. A. B. 82 and 83, that at the time when the entries were made in Ex. D. 18, the defendants must have been expecting investigations to be made by the plaintiffs; and that fictitious entries were made to reduce the shortage of cartons of 3½ oz. gold-lid bottles which had been replaced. And it seems to me highly probable that the person responsible for the shortage was Dennis. He became a director of the defendant company about the 2nd February, 1960, but resigned from their service immediately after the shortage was discovered on the 15th August, 1960, by Messrs. Rennie Lowick & Co. who were instructed to check the defendants' stocks by the plaintiffs. What was

the actual extent of the shortage? As far as the plaintiffs were concerned, they replaced 1935 cartons of 3½ oz. gold-lid bottles. The defendants returned to the plaintiffs' solicitor only 1288 57/72 cartons. The amount not returned was 646 15/72 cartons. Of these 500 cartons could not be returned because they did not exist. The amount which could have been but was not returned was therefore 146 15/72 cartons. 17 40/72 cartons were destroyed by the defendants at Kuala Lumpur. That left a shortage of 128 47/72 cartons to be accounted for. The fact that 143 cartons were shown as destroyed in Singapore in Ex. D. 18, when in fact only a shortage of 128 47/72 had to be accounted for, makes it difficult to believe the defendants' evidence as to the destruction of 143 cartons in Singapore.

It is not possible for me to find that there was conversion in respect of the 128 47/72 cartons, as there is no evidence that they had become the property of the plaintiffs when they were disposed of. The law is clear that, in order to maintain an action of trover, a person must have the right of possession and a right of property in the goods at the time of the alleged conversion. The statement of the law to this effect in 38 *Halsbury's* Laws of England, 3rd edition, at page 783, was approved by Evershed M.R. in *Jarvis* v. *Williams* [2] at page 111.

Although the plaintiffs have failed to prove conversion in respect of the 128 47/72 cartons, the defendants are liable to account for them. The amount which the defendants have to pay for them depends on their value on the 16th August, 1960. The plaintiffs say that their value is $150 per carton, which is the defendants' normal selling price. The defendants say that the cartons were valueless as, if they had been returned in August, 1960, they would have been dumped in the sea together with the 1288 57/72 cartons which were returned to the plaintiffs. In my view, the 128 47/72 cartons were not valueless and were worth the c.i.f. price of $78 per carton, which the plaintiffs could have reasonably expected to obtain from an importer willing to purchase them. On this basis the value of the 128 47/72 cartons is $10.034.92. I assess the amount payable by the defendants for those cartons at this sum.

It is not disputed that out of the amount to which the plaintiffs are entitled the sum of $15,240.56 should be deducted for customs duty paid by the defendants on cartons of 3½ oz. gold-lid bottles which were sent into the Federation of Malaya and subsequently returned to Singapore.

The plaintiffs have agreed to give the defendants credit for a further quantity of 26 70/72 cartons of 3½ oz. gold-lid bottles, which the defendants disclosed as being in their possession during the trial. The value of these at the c.i.f. cost of $78 per carton is $2,103.83.

The total of the two amounts to which the plaintiffs are entitled is $39,000 plus $10,034.92 i.e. $49,034.92. The total of the two amounts which have to be deducted is $15,240.56 plus $2,103.83 i.e. $17,344.39. The net amount to which the plaintiffs are entitled is $49,034.92 less $17,344.39 i.e. $31,690.53.

I now turn to the claim for damages for breach of the amortization agreement of the 7th January, 1959. It was alleged in the statement of claim that it was agreed in January, 1959, that the defendants would not put on the open market for sale any further stock of 3½ oz. gold-lid bottles of "Apollo" chicken essence after the 31st March, 1959. In his opening address counsel for the plaintiffs said that the words "after the 31st March, 1959," really meant "after the arrival of the 3½ oz. red-lid bottles". The first consignment of 3½ oz. red-lid bottles arrived in Singapore on or about the 4th April, 1959, by the *Talleyrand*. Counsel for the plaintiffs submits that the term alleged by the plaintiffs is evidenced by the cablegram of the 5th January, 1959, sent by the defendants and Moeloek to the plaintiffs, and the plaintiffs' letter of the 8th January, 1959, Ex. A. B. 10. I find no express written term to the effect alleged in either the cablegram or the letter. It seems to me that counsel for the plaintiffs, in effect, seeks to construe the words "3400 to be amortized" appearing in the cablegram as "3400 cartons to be extinguished, that is, withdrawn from sale". I must reject this construction of the word "amortized" as that is not the sense in which the parties understood the word.

I must now consider the question whether there was an express oral term to the alleged effect. For this the plaintiffs rely on the evidence of Moeloek that the defendants told him in January, 1959, that they would withdraw gold-lid bottles from the market; and that it was agreed that the defendants would withdraw gold-lid bottles from the market as soon as the red-lid bottles arrived. This evidence is contradicted and nullified by Moeloek's own evidence, given subsequently, that it was agreed in January, 1959, that the defendants were to get rid of as much of the gold-lid bottles as they could and that the plaintiffs would take back later what they could not get rid of.

The plaintiffs also rely on the evidence of their witness, Teo Thuang Hai, a former director of the defendant company, who took part as such director in the negotiations between the plaintiffs and defendants in January, 1959. Teo's evidence is that he assured Moeloek that on receipt of the red-lid bottles the defendants would

withdraw the gold-lid bottles from the market; and that it was agreed that the defendants would discontinue the sale of the old stock the moment the new stock arrived. I reject this evidence for four reasons. First, it is inconsistent with Moeloek's own evidence to the contrary. Secondly, there is evidence that Teo is an unscrupulous person capable of saying and doing anything to suit his own interests. Thirdly, he is not an impartial witness. Fourthly, his evidence is not supported by the correspondence between the parties.

As regards Teo's unscrupulousness it is sufficient to deal with two matters. The first matter is this. On the 12th January, 1960, Watt wrote a letter, Ex. D. 19, to Teo who was then in Australia, asking him to return to explain how the premium on "Wolf" Stout was incurred and distributed or resign from the board of directors of the defendant company. Teo resigned on the 15th January, 1960; and in a personal letter to Watt dated the 7th March, 1960, Ex. D. 22, described himself as a rat "who disappointed your confidence and friendship". Teo admitted that a letter dated the 17th June, 1960, from Yong Hong Thye Corporation to H. Dunn of Messrs Guiness Exports Ltd., Liverpool, Ex. D. 14, was written on his instructions and approved by him. The letter stated that each of the twelve distributors of "Wolf" Stout, of whom Yong Hong Thye Corporation were one, paid into a distributors' pool an agreed sum of $9 for every case of quart-size bottles and $11 for every case of pint-size bottles purchased by them; that entertainment was paid for out of the pool; that the balance of the pool was used for advertising; and that the balance, which was approximately $10,000 per quarter, was handled by Teo as managing director of Yong Hong Thye Corporation; and that after his resignation from the defendant company in January, 1960, the balance of the pool was handed to the defendants. Teo admitted in cross-examination that the last allegation in the letter was not true and that not one cent of the distributors' money was paid to the defendants or any officer or servant of the defendants.

The second matter indicating Teo's unscrupulousness is his visit to New York in April/May, 1960. According to the evidence of Vanelzas, Teo saw Vanelzas in New York once or twice in April, 1960, and told Vanelzas that he was no longer with the defendants and was trying to see whether he could develop business; Teo said he was going in for general trading and did not mention chicken essence; they did not discuss chicken essence at all. According to Teo's evidence, he went to the U.S.A. to look for a chicken essence agency for Yong Hong Thye Corporation of which he was a director; he told Vanelzas that he was looking for agencies for Yong Hong Thye Corporation; Vanelzas made no comments; Teo approached no one for any agencies held by the defendants. It seems to me that Teo must have made arrangements with Vanelzas in April/May, 1960, for Yong Hong Thye Corporation to take the place of the defendants as exclusive distributors of the chicken essence manufactured by the plaintiffs. For in June, 1960, he applied for registration of the trade mark "YIPOLY" for chicken essence. This word is the Chinese equivalent of "APOLLO", which is the registered trade mark owned by the defendants. It seems to me that the letter of the 3rd June, 1960, Ex. A. B. 81, in which the plaintiffs repudiated the agreement for amortization must have been sent as a result of certain information given by Teo to Vanelzas in April/May, 1960. The first shipment of chicken essence manufactured by the plaintiffs and sold under the "Yipoly" trade mark was shipped to Yong Hong Thye Corporation in November, 1960. In my opinion, both Teo and Vanelzas lied when they said they did not discuss chicken essence at all during Teo's visit to New York in April/May, 1960. And the fact that Yong Hong Thye Corporation took the place of the defendants as exclusive distributors of the chicken essence manufactured by the plaintiffs makes it impossible to regard Teo as an impartial witness.

What does the correspondence between the parties disclose? In their letter of the 19th March, 1959, Ex. A. B. 15, the plaintiffs said to the defendants:

> "We are very pleased that the time has come for fresh merchandise to arrive shortly at yours, which will enable you to discontinue sales on the old stock. This of course will avoid any further jeopardy to the future of Apollo essence of chicken in the Singapore/Malayan markets."

In their letter of the 10th April, 1959, Ex. A. B. 16, the defendants said to the plaintiffs:

> "We have already incurred such heavy expense in promoting 'Apollo' we certainly cannot afford to lose further, therefore, we are not prepared to put our new supplies on the market and cannot place further Indents until our old stock is considerably reduced.
>
> . . . . . .
>
> You can rest assured we have done, and are doing all we possibly can to get rid of our stocks."

In their letter of the 29th April, 1959, Ex. A. B. 20, the plaintiffs said to the defendants:

> "We are very grateful for the efforts put forth by you to clear this old stock and wish you great success in this regard."

In his letter of the 29th June, 1959, Ex. A. B. 24, Vanelzas said to Watt:

> "We here, were always of the opinion that you would discontinue the sale of the old stock the moment fresh merchandise arrived at yours. This conclusion was drawn by us, because of your many references to the fact that the continued sale of old stock would jeopardize the future of the market. In addition this was also one of

the reasons why we agreed to the present amortization program, despite the financial hardship."

In his letter of the 6th July, 1959, Ex. A. B. 26, Vanelzas said to Watt:

"I respectfully urge you to withdraw the old stock and start marketing the new improved 1959 Apollo."

In his letter of the 16th July, 1959, Ex. A. B. 29, Watt replied to Vanelzas:

"I have given orders to stop the sale of the old stocks immediately."

In his letter of the 24th July, 1959, Ex. A. B. 30, Vanelzas replied to Watt:

"I am glad that you gave immediate orders to discontinue sale of old stock to avoid further aggravation on the dealers and market in general."

In his letter of the 31st July, 1959, Ex. A. B. 31, Watt replied to Vanelzas:

"I have already instructed branches to ship or rail all old stocks to Singapore which we will replace free of charge and return freight paid."

In his letter of the 18th September, 1959, Ex. A. B. 35, Watt said to Vanelzas:

"We have now collected all the old 3½ oz. gold-lid stocks from the branches."

In their letter of the 9th October, 1959, Ex. A. B. 36, the plaintiffs said to the defendants:

"We have been informed by your Chairman, W. McGregor Watt, Esq., that all of the 3½ oz. gold-lid stocks of Apollo essence of chicken have been collected by you in Singapore.

. . . . . .

We wish to thank you again for all of your endeavours in selling off as much gold-lid as possible."

There is no suggestion in the correspondence set out above that it was an express written or oral term of the amortization agreement of the 7th January, 1959, that the defendants would not put on the open market for sale any further stock of 3½ oz. gold-lid bottles after the arrival of the 3½ oz. red-lid bottles. There is no suggestion in the correspondence even that there was an implied term to that effect in January, 1959. If there had been an express or implied term to that effect it would have been stressed by Vanelzas in his letter of the 29th June, 1959, Ex. A. B. 24, to Watt. In that letter Vanelzas merely states that the plaintiffs were always of the opinion that the defendants would discontinue the sale of the old stock the moment fresh merchandise arrived in Singapore. He then states that that conclusion was drawn by the plaintiffs because of the many references by the defendants to the fact that the continued sale of old stock would jeopardize the future of the market. He further states that this fact was also one of the reasons why the plaintiffs agreed to the amortization program despite the financial hardship.

There is no suggestion of any express or implied term to the effect mentioned above in the plaintiffs' letter of the 20th August, 1960, Ex. A. B. 98, in which the plaintiffs terminated the appointment of the defendants as exclusive distributors of the chicken essence manufactured by the plaintiffs. All that the plaintiffs say in that letter is this:

"The act of continuing to sell on the market stock which at your request was withdrawn as being of bad and inferior quality and which was by agreement amortized and thereby became our exclusive property is of such a nature that we can no longer permit our agency to remain in your hands."

There is no suggestion of any express or implied term to the effect mentioned above in the plaintiffs' solicitor's letter to the defendants' solicitors dated the 31st August, 1960, Ex. A. B. 104. The allegation made in the letter is this:

"Your clients have sold 3½ oz. jars of chicken essence with gold lids after it was agreed that they should be amortized."

The suggestion here is that the 3½ oz. gold-lid bottles should not have been sold after the 7th January, 1959, which was the date of the amortization agreement. Such a suggestion does not make sense. What the plaintiffs' solicitor probably meant to say was this:

"Your clients have sold 3½ oz. jars of chicken essence with gold lids after they had been amortized (i.e. replaced under the amortization agreement) and thereby become our exclusive property."

Such an allegation would make sense but would not help the plaintiffs to prove an express or implied term to the effect alleged by them. It is possible that the plaintiffs' solicitor used the word "amortized" as meaning "withdrawn from sale". But, as I have already pointed out, the word was not understood by the parties to have that meaning.

Vanelzas admitted in cross-examination that the cloudiness of the chicken essence in the 3½ oz. gold-lid bottles was a defect in workmanship. Clause 3 of the contract of the 19th November, 1957, reads as follows:

"We warrant that all products furnished by us to you shall be free from defects in material and workmanship, and that in fulfilment of any breach of such warranty, we will replace any merchandise that shall be returned to us, with shipping charges prepaid and which upon examination shall prove to have been defective."

Vanelzas admitted that the amortization agreement of the 7th January, 1959, was made in substitution for the return and reconditioning of the chicken essence in the 3½ oz. gold-lid bottles. He admitted that it was too expensive to recondition it in the U.S.A. because of the freight both ways and other charges. As I have already pointed out, it is clear that by the word "amortization", the parties meant extinguishment of a liability over a period of time, and that the liability which they agreed to amortize was the plaintiffs' liability to replace chicken essence which was defective in workmanship. In my

view, the reason why the plaintiffs entered into the amortization agreement was that they wanted an arrangement whereby they could replace the defective chicken essence over a period of time with the minimum expenditure to themselves.

The plaintiffs stress the point that one of their reasons for entering into the amortization agreement was the fact that the continued sale of the gold-lid bottles would jeopardize the future of the market; and that they were always of the opinion that the defendants would discontinue the sale of the gold-lid bottles the moment the red-lid bottles arrived in Singapore because of the many references made by the defendants to that fact. It seems to me that by stressing this point the plaintiffs are now, in effect, asking the court to find an implied term that the gold-lid bottles would be withdrawn immediately after the arrival of the red-lid bottles. In my opinion, such a term can only be implied if it is clear that both parties intended such a term to operate although they did not express it. The correspondence which I have considered does not show that both parties on the 7th January, 1959, intended such a term to operate. Watt gave orders to stop the sale of the gold-lid bottles on or about the 16th July, 1959, only as a result of the respectful urging by Vanelzas in his letter of the 6th July, 1959. In my view, the expression of gratitude by Vanelzas for the defendants' efforts to sell off as much gold-lid stock as possible in his letters of the 29th April and 9th October, 1959, seems hardly compatible with the implied term now suggested by the plaintiffs.

Evidence that the plaintiffs expected sales of gold-lid bottles to continue after the arrival of the first shipment of red-lid bottles on the 4th April, 1959, is furnished by the plaintiffs' letter of the 10th November, 1959, to the defendants, Ex. A. B. 42. There the plaintiffs said:

> "Please find enclosed herewith, our statement of the amortization account as of November 10th, 1959. You will note that this statement shows a total of 1664 36/72 cartons having been amortized as of this date.
>
> Upon completion of shipments against Indent 1115, Singapore, F647 Kuala Lumpur and F558 Ipoh, a total of 1697 cartons will have been amortized. Since this figure will undoubtedly exceed your total of 3½ oz. gold lid stocks, we would appreciate receiving your final figure, as soon as possible, so that we may finalize the 3½ oz. portion of the amortization scheme."

This letter shows that on the 10th November, 1959, the plaintiffs were of the opinion that the quantity of 3½ oz. gold-lid stocks in the possession of the defendants was less than 1697 cartons. The plaintiffs must, therefore, have been expecting the sales of gold-lid stocks after the 10th April, 1959, to have brought down the total of gold-lid stocks from 2283 cartons to something less than 1697. It must be stated here that according to the defendants' letter of the 10th April, 1959, to the plaintiffs, Ex. A. B. 16, the defendants had 3400 cartons of old stock in their possession on that date. This is what the defendants anticipated in their cablegram of the 5th January, 1959. Presumably 2283 out of the 3400 were cartons of 3½ oz. gold-lid bottles.

Counsel for the plaintiffs refers to this sentence written by Dennis in his letter of the 11th July, 1960, Ex. A. B. 85, to O'Keefe:

> "We have not sold any gold lid stock after receipt of the red lid."

He invites me to draw from this denial the inference that it was agreed that the defendants would not sell any gold-lid stock after receipt of the red-lid. The correspondence referred to above, in my opinion, shows that the defendants did sell gold-lid bottles after receipt of the red-lid bottles and made no secret of it. Dennis himself in his private and confidential letter of the 16th June, 1960, Ex. A. B. 83, to Vanelzas said:

> "I do not need to recall that you originally agreed to amortize 3400 cartons gold lid and we have managed to reduce your total write-off by nearly 1000 cartons less than that."

According to the defendants' letter of the 10th April, 1959, Ex. A. B. 16, to the plaintiffs, the defendants had 3400 cartons of the old stock on that date. I think therefore that in Ex. A. B. 83 Dennis was stating that nearly 1000 cartons of gold-lid stock had been sold since the 10th April, 1959. If so, what did Dennis mean to say in Ex. A. B. 85? It seems to me that Dennis meant to say "We have not sold any gold lid stock amortized (i.e. replaced) after receipt of the red lid." If this is what Dennis meant, it is impossible for me to draw from it the inference suggested by counsel for the plaintiffs.

For the above reasons I find that there was no express written or oral term or implied term to the effect alleged by the plaintiffs; and I dismiss the plaintiffs' claim for damages for breach of the amortization agreement of the 7th January, 1959.

I now come to the counterclaim. Three claims are set up by way of counterclaim. The first claim is for the value of 634 127/144 cartons of 1¾ oz. red-lid bottles which the defendants have in their possession. Their value at $109 per carton is $69,202.14. It is said that the plaintiffs' letter of the 3rd June, 1960, Ex. A. B. 81, expressly repudiated the amortization agreement of the 7th January, 1959, and thereby relieved the defendants of their obligations to perform their part of the agreement. It is not disputed that these 1¾ oz. red-lid bottles contain the same sub-standard chicken essence as that contained in the 3½ oz. gold-lid bottles and that they are covered by the amortization agreement. Under that agreement the defendants, by placing further orders for 1¾ oz. red-lid bottles of the improved chicken essence, could obtain free 10%

of the quantity ordered by way of replacement of a corresponding quantity of 1¾ oz. red-lid bottles of sub-standard chicken essence. The defendants say that, because the plaintiffs expressly repudiated the amortization agreement, the defendants are entitled to claim the full value of the 634 127/144 cartons of 1¾ oz. red-lid bottles without having to place further orders. The plaintiffs' answer to this claim is that they offered twice to buy back the stock of 1¾ oz. red-lid bottles at the c.i.f. price, but this offer was refused by the defendants. The first offer was made in paragraph 3 of the plaintiffs' letter of the 20th August, 1960, Ex. A. B. 98, which reads as follows:

"We are quite prepared to relieve you at cost of all stock now on your hands, and if you so agree please forward to our attorney, Mr. M. B. Brash, a full statement of all stock now held by you, for our consideration."

The second offer was made in paragraph 10 of the plaintiffs' solicitor's letter of the 31st August, 1960, Ex. A. B. 105, which reads as follows:

"In my client corporation's letter of the 20th August, 1960, paragraph 3, they have requested that your clients send me a full statement of all stock now held by them for consideration, if your clients wish to be relieved at cost of the stock which they at present hold. My instructions are that this position is to be dealt with at once, and I would be glad if you would impress upon your clients that it is urgent."

The reply of the defendants is set out in paragraph 10 of their letter of the 7th September, 1960, Ex. A. B. 112, which reads as follows:

"Our clients do not wish to be relieved of the stock which they at present hold and which they are continuing to sell. A sudden withdrawal of all stock from the market would, of course, cause irreparable damage to the product. Why your clients should wish to cause this situation to arise cannot be understood unless your clients deliberately wish to damage our client's trade mark."

In my opinion the law imposes a duty upon the defendants to take all reasonable steps to mitigate the loss caused by the breach of contract committed by the plaintiffs and debars them from claiming compensation for any part of the damage which is due to the defendants' neglect to do so. The authority for this view is *British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Railways Co. of London,*[3] where Viscount Haldane L.C. said:

"The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps."

The case of *Payzu* v. *Saunders,*[4] shows that the opportunity to mitigate the loss may arise through an offer made by the party who committed the breach of contract, and that if such an offer is reasonable the other party should mitigate his loss by accepting it. In my view, an opportunity to mitigate the defendants' loss arose through the offer made by the plaintiffs; the offer was reasonable and the defendants should have mitigated their loss by accepting it. If the defendants had accepted the offer made by the plaintiffs, they would have recovered the value of the cartons of 1¾ oz. red-lid bottles held by them. I think that the defendants were unreasonable in refusing to accept the offer made by the plaintiffs, and I therefore dismiss the first claim set up by way of counterclaim.

I pass on to the second claim set up by way of counterclaim. This is a claim for $44,495.55 on a guarantee by the plaintiffs of the account of Chang Hway Trading Co. Ltd. of Hongkong by a cablegram dated the 8th January, 1960. The plaintiffs' letter of the 8th January, 1960, to the defendants, Ex. A. B. 58, states:

"We wish to confirm our today's cable, reading 'we fully guarantee changhway account with you'.

. . . . . .

In the event this obligation will not be fulfilled by Messrs. Chang Hway Trading Co. Ltd. of Hongkong, payment of same will be effected by us."

Counsel for the plaintiffs admits that the plaintiffs guaranteed this account and states that the consideration for the guarantee was that the defendants would supply "Apollo" chicken essence to the principal debtors. He also admits the amount due from the principal debtors and the fact that the amount due was covered by the guarantee. The plaintiffs' defence to this claim is that they are discharged from liability under the guarantee as there was a binding agreement to give time to the principal debtors made between the defendants and the principal debtors without the plaintiffs' consent.

The evidence on which the plaintiffs rely is as follows. Khouw Bian Tjeng, the managing director of Chang Hway Trading Co., states in his personal letter of the 25th October, 1960, Ex. 2 A. B. 43, to Watt, the chairman of the board of directors of the defendant company:

"My company have been notified by your Hongkong office to settle our outstanding account not later than the 29th October, failing which legal action will be taken.

. . . . . .

The only thing I hereby wish to request you is to kindly have some consideration in regard to the time of payment from us owing to the factors which I have tried to outline briefly to you. I shall be most grateful, if you could kindly extend the final date till November 30th, 1960. Meanwhile, I have also already immediately written and cabled our guarantors, Messrs. Pasuma Pharmacal Corporation in New York, to communicate with your head office in Singapore, accordingly."

To this personal letter the defendants sent the following reply dated the 27th October, 1960, Ex. 2 A. B. 44, to Chang Hway Trading Company for the kind attention of Mr. Khouw Bian Tjeng:

"We have for acknowledgment your letter of the 25th October contents of which are duly noted and we

look forward to receiving settlement of your outstanding account at an early date."

In reply to this letter Khouw Bian Tjeng sent the following personal letter dated the 29th October, 1960, Ex. 2 A. B. 45, to Watt:

"Allow me to hereby express my thanks for the kind consideration I have just received from your esteemed company in regard to the settlement of the outstanding account my company still owes to your company, as well as for your kind personal friendly gesture in this matter."

The law on the point taken by the plaintiffs is stated thus in 18 *Halsbury's* Laws of England, 3rd edition, at pages 508 and 509:

"A binding agreement between the creditor and the principal debtor to give time to the latter, as distinguished from mere passive inactivity on the part of the former (not resulting from any contract with the principal debtor), will discharge the surety from liability, if made without his consent, whether he is prejudiced thereby or not.

. . . . . .

The agreement giving time must be really binding and capable of enforcement, for valuable consideration, made with the principal debtor, and must actually give time."

I accept these passages as a correct statement of the law. In my opinion, although the defendants gave time to Chang Hway Trading Co. by their letter of the 27th October, 1960, there was no binding agreement to give time; and therefore the plaintiffs were not discharged from liability under the guarantee, and the defendants' second claim set up by way of counterclaim succeeds.

That brings me to the third claim set up by way of counterclaim. This is a claim for damages for termination of the contract of the 19th November, 1957, on the 20th August, 1960, in breach of its terms. Clause 8 of the contract provides as follows:

"This agreement shall be deemed to have begun on the first day of May, 1957, and shall continue for a term of five (5) years thereafter, and at the expiration of such term shall be renewed from year to year unless either of the parties notifies the other, by registered letter mailed at least six (6) months before the expiration of such term, of its intention to terminate such agreement."

I construe this clause as follows. The parties agree (1) that the agreement shall continue for at least 5 years, i.e. from the 1st May, 1957, to the 30th April, 1962; and (2) that the agreement shall be renewed from year to year at the expiration of the term of 5 years unless either party gives notice of intention to terminate the agreement at least 6 months before the expiration of the term. The law is clear that "where the parties to a contract stipulate that the contract is to continue for a definite period, the contract cannot be terminated before the expiration of that period, unless the parties are empowered so to do by the terms of the contract, or agree to rescind it": the law is so stated in 8 *Halsbury's* Laws of English, 3rd edition, at page 157, and I accept the passage as a correct statement of the law. In the present case the terms of the contract do not empower either party to terminate the contract before the expiration of five years from the 1st May, 1957: nor have the parties agreed to rescind the contract.

Counsel for the plaintiffs submits that the termination of the contract of the 19th November, 1957, was lawful, but he cites no authority in support of his submission. The reason for the termination is stated as follows in the notice dated the 20th August, 1960, Ex. A. B. 98, which terminated the contract with immediate effect:

"The act of continuing to sell on the market stock which at your request was withdrawn as being of bad and inferior quality and which was by agreement amortized and thereby became our exclusive property, is of such a nature that we can no longer permit our agency to remain in your hands."

The law as to terminating an agency for a fixed term before the expiration of the time agreed upon is stated thus in 1 *Halsbury's* Laws of England, 3rd edition, at page 240:

"Where an agency is created for a fixed time, the principal's right, as between himself and the agent, to terminate it before the expiration of the time agreed upon must be ascertained from the terms of the agreement and the facts of the particular case. The taking of a bribe has been held to be good ground for termination of the agency, and the common defences of incompetence or negligence would avail in an action for wrongful dismissal."

In my opinion, this passage states the law correctly. As I have already stated, the contract of the 19th November, 1957, does not provide for the termination of the contract before the expiration of five years. In fact it provides that the contract "shall continue for a term of five years". What are the facts of this particular case? It is alleged in the notice that the defendants sold stock which had been amortized and had thereby become the plaintiffs' exclusive property. This allegation has not been proved by the plaintiffs. As I have said earlier, in my view, Dennis was guilty of fraud in increasing by 500 cartons the number of cartons of 3½ oz. gold-lid bottles to be replaced by the plaintiffs: and the defendants are liable for this fraud; and the defendants are liable to account for a shortage of 128 47/72 cartons of 3½ oz. gold-lid bottles. Do these facts give the plaintiffs the rights to terminate the contract of the 19th November, 1957? It is unnecessary to consider this question because the passage cited from 1 *Halsbury's* Laws of England, 3rd edition, at page 240, only applies to the termination of an agency, and in my view the contract of the 19th November, 1957, is not one of agency at all. In the contract the defendants are appointed and accepted the appointment as exclusive distributors of the plaintiffs' product known as

"Apollo" brand essence of chicken in the area described in the contract. In effect, the plaintiffs as manufacturers give the defendants as exclusive distributors in that area a monopoly in the sale of the plaintiffs' product. The relation between the plaintiffs and the defendants is that of vendor and purchaser. Clause 3 of the contract reads:

"We agree to sell you and you agree to purchase from us, Apollo brand essence of chicken at our price c.i.f. ocean ports in your territory, as of the date of receipt of your order or orders."

The relation between the plaintiffs and the defendants is not that of principal and agent. The defendants are not authorized to bring the plaintiffs as manufacturers into contractual relations with persons purchasing "Apollo" chicken essence from the defendants. That being so, the principle laid down in the passage cited from 8 *Halsbury's* Laws of England, 3rd edition, at page 157, is applicable. And as the parties stipulated that the contract was to continue for five years from the 1st May, 1957, I hold that the contract could not be terminated before the expiration of that period. The third claim set up by way of counterclaim accordingly succeeds.

It now remains for me to assess the damages. The price paid by the defendants was $78 per carton of 3½ oz. bottles and they sold each carton for $150. They made a profit of $65 per carton according to the evidence given by Teo. Their sales amounted to 500 cartons a month on the average. The contract was terminated about 20 months before the expiration of the term of 5 years fixed by the contract. In my opinion the defendants could have made a profit of at least $650,000 as exclusive distributors of "Apollo" chicken essence during the period of 20 months. The unlawful termination of the contract by the plaintiffs deprived the defendants of this profit. I therefore assess the damages at $650,000.

The result is that for the reasons given above I give judgment for the plaintiffs for $31,690.53 on their claim and judgment for the defendants for $694,495.55 on their counterclaim, and I reserve the question of costs.

Order accordingly.

Solicitors: *M. B. Brash*; *Drew & Napier.*

LIN NYUK CHAN v. WONG SZ TSIN

[F.C. (Thomson L.P., Wee Chong Jin C.J. (Singapore) and Wylie C.J. (Borneo)) February 4, 1964]

[Jesselton — Federal Court Civil Appeal No. 45 of 1963]

Landlord and Tenant — Tenancy agreement — Term as to rent payable — Whether uncertain — Whether enforceable.

Land Ordinance (Sabah Cap. 68), ss. 88, 94, 116 — Whether contract otherwise valid and enforceable rendered void by non-registration.

Specific performance — Agreement part performed — Entry into possession — Agreement vague on subsidiary matters — Whether specifically enforceable.

The appellant, the tenant of business premises entered into a "tenancy agreement" with the respondent the owner of the said premises on November 25, 1960 for a period of 15 years from January 16, 1961. The provision for rent read "....paying therefor the monthly rent of $650. Subject to variation upwards or downwards as the case in accordance with the market rental value of similar shophouses along Beach Street, Jesselton (particularly the shophouse adjoining the said demised premises) to be payable by the 15th day of every month." The appellant went into possession and paid $650 monthly rent from February to December 1961. In January 1962 correspondence ensued between the parties as to the variation of rent and the registration of a lease in accordance with the original agreement. The appellant commenced proceedings in November 1962 in the High Court for an order that the voluntary offer of increase of rent from $650 to $680 was a fair current rent, that a new lease embodying the same terms and conditions in the original lease be made in accordance with form XVI of the Land Ordinance and registered under section 104 of the said Ordinance by way of specific performance. The trial judge gave judgment against the plaintiff on the ground that the provision with regard to varying the amount of rent was so uncertain as to make the agreement unenforceable by an order for specific performance. On appeal to the Federal Court the only issues were (i) the amount of rent payable at that stage of the term of the tenancy and (ii) whether the "tenancy agreement" was valid and enforceable by way of specific performance.

Held: (1) the rent fixed in the agreement was not uncertain but was fixed at $650 at the outset with a provision for subsequent variation;

(2) having regard to all that was provided for in the lease there was nothing so fundamental as to deprive the appellant of a decree of specific performance especially when the appellant had been in possession for nearly three years and was still in possession without any attempt by the landlord to evict him.

Observations on sections 88, 94 and 116 of the Land Ordinance (Sabah), the Land Titles Ordinance, 1956 (Singapore) section 27; Selangor Registration of Titles Regulation 1891 section 4.

Cases referred to: —

(1) *Attorney-General for Ontario* v. *Canadian Niagara Power Co.* [1912] A.C. 852.

(2) *Watcham* v. *East Africa Protectorate* [1919] A.C. 533, pp. 538 - 540.

(3) *Gregory* v. *Mighell* (1811) 18 Ves. 328; 34 E.R. 341.

(4) *Parker* v *Taswell* (1858) 2 DcG. & J. 559; 44 E.R. 1106.

(5) *Sanderson* v. *Cockermouth & Workington Railway Co.* (1849) 11 Beav. 497; 50 E.R. 909.

(6) *Hart* v. *Hart* (1881) 18 Ch. D. 670.

(7) *Abigail* v. *Lapin* [1934] A.C. 491.

(8) *Haji Abdul Rahman* v. *Mohamed Hassan* [1917] A.C. 209; 1 F.M.S.L.R. 290.